

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE MICHAEL W. FITZGERALD, U.S. DISTRICT JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, September 9, 2019

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THE CLERK: Calling item two, CV-18-5934-MWF, Ox
Labs, Inc. vs. Bitpay, Inc., et al.

Counsel, state your appearance for the record.

MR. LEIDER: Good morning, Your Honor. Philip Leider
for Plaintiff Ox Lab, Inc.

MR. KUNIN: Good morning, Your Honor. Larry Kunin on behalf of Defendant Bitpay, Inc.

MR. WANG: Good morning, Your Honor. Ben Wang, also on behalf of the defendant.

THE COURT: All right. If the plaintiff would please get closer to the jury box, and if the defendants would please sit over here. Thank you.

You know, since the tentative won't be in the record in any way, let me summarize what it says so our discussion here will be clear.

You know, the real issue that you are arguing about, obviously, is whether the increased value from the hard forks should stay with Bitpay or go to Ox Labs as the principal SFOX, or however you pronounce it.

First, let me just say as a preliminary matter, I really think that the best way of dealing with this subsidiary issue is for the two of you to figure the cheapest, quickest, easiest way to clean it up, because I'm just going to say I am not going to have the case turn on that issue.

1 Whatever needs to be done, if you don't agree, then
2 will be done, including just filing a complaint all over
3 again, and we can just start it. I'm just not going to allow
4 that to happen here. It wouldn't be fair.

5 That being said, once we get past that point, then I
6 think Ox Labs is seriously overestimating the sympathy with
7 which anyone, including a future trier of fact, is going to
8 view what happened here.

9 You know, if -- if the situation was different and
10 Bitpay had just -- was -- had just gotten these things and
11 sat on them and sat on them and was trying to hoard the value
12 of the splits, then that would be one thing, but that is just
13 not the situation here. And in light of that, it's just very
14 difficult for Ox Labs to go through and to try to thread that
15 needle to lay claim to those.

16 But the issue now here that is really in front of me
17 is, aside from making the specific rulings that I'm
18 suggesting in the tentative, is what goes forward from here?
19 You know, there is a couple of legal issues that weren't
20 really joined in the briefing. And I in no way am
21 criticizing the lawyers here. It makes sense that Bitpay
22 would obviously want to use summary judgment, if you are
23 going to go to all the effort and expense of filing the
24 motion, to make the case go away. And having done that, it
25 makes sense that the plaintiff is going to then show why

1 there are these undecided issues of law which directly lead
2 to certain genuine issues of material fact.

3 And I've approached my tentative in that light, and
4 I will rule in that light. But that ultimately doesn't mean
5 that we will just then, you know, pick a jury and go forward.
6 The whole purpose of having a final pretrial conference is to
7 sort out what is an issue for the jury and what isn't, and
8 determine if there is a need for a trial or if there is not.

9 And I -- you know, especially given the statute, it
10 just seems so unlikely that Ox Labs would be able to
11 determine the -- that the alternative measure would be used
12 here that, or maybe it even hasn't and I should just rule
13 that way right now.

14 As I point out in the tentative, okay, I do that,
15 there is still these genuine issues of material fact, even
16 given that measure, it just seems something that the parties
17 should be able to work out between themselves without having
18 a trial, but if you want a trial, then you will get a trial.

19 So with those preliminary thoughts, I'll hear first
20 from Bitpay as the moving party, and then I'll hear from the
21 plaintiff.

22 MR. KUNIN: Good morning, Your Honor.

23 First of all, having read the tentative, I don't
24 have a lot to add to it, and therefore will cut through most
25 of my argument. There's just a couple of things that I would

like to point out in the tentative, and a couple of them might even be practical issues.

One, there is a cited question of fact as to what value of the Bitcoin was on the day that the plaintiff made the error. And we did submit the transactional record that day and highlighted what the actual trading value was after the error had occurred, that the closest one that it occurred. And that was the number that the tender was based on. That tender actually didn't take into consideration the fact that there were fees deducted out of that, so it was actually technically a slight overpay. So we do think that that is in the record.

We agree that an interest amount that would be on that is not in the record, but that is certainly something we can work out. It doesn't make sense to try a case that what we are going to charge to try the case over something of that particular value. But that value should be calculated off of what the proceeds were on that particular day, not on the gross amount, but rather net of the fees.

Next thing we would like to point out has to do with the hard fork, which does not appear to be relevant based on the preliminary ruling that the value is the day of the transaction, because that is something that occurred later in time, and there actually has been no evidence put in that Bitpay in any way benefited from any hard fork, whether tied

1 to the plaintiff's error or not the plaintiff's error.

2 THE COURT: And that is certainly a strong argument,
3 but it also presumes that what I'm really doing here is
4 granting an implicit motion for partial summary adjudication
5 on whether the statute applies. And for the reasons that I
6 suggested, perhaps too cryptically in the tentative, I have a
7 certain reluctance to do that because -- you know, if -- if
8 Bitpay -- and again, I don't mean to criticize you for not
9 doing this, it probably wouldn't have been a good use of your
10 client's money -- but from my point of view, if Bitpay had
11 simply said, "Here is a motion for partial summary
12 adjudication. We want a ruling right now on the measure
13 under the statute and whether the alternative can be met, and
14 here is the California case law that says it's a matter of
15 law, and here is all the cases where the Court of Appeal had
16 said, yay or nay, and, look, this isn't nearly special
17 enough," then I -- and if that motion was granted, then it
18 could arguably follow, as you suggest, that what is happening
19 here.

20 But what in fact happened is that you reasonably
21 enough said, "We want this case to go away; and therefore, we
22 want the conversion claim to go away; and therefore, look at
23 the statute, and we should win, and having that, then we are
24 tendering all this money." And then approaching it from that
25 light, the plaintiff came back and said, "Oh, look at all,

1 you know, there is -- here is our footnote about how we don't
2 have to accept their offer," which is true as far as it goes
3 for purposes of ruling on the motion, they are not obliged to
4 accept that money in the sense the argument that they have
5 been paid as a literal case, not true.

6 So then what you've got is all of these somewhat
7 meager sort of things going on, but collectively, they do
8 seem to be -- to frustrate summary judgment.

9 So I guess the premise of your argument is what has
10 to be dealt with, either now or before or at the final
11 pretrial conference, which is a definitive legal ruling that
12 the primary measure under the statute is what applies here as
13 a matter of law.

14 And that is -- that seems to me to be a bit -- I
15 just feel reluctant to do that without giving Ox Labs some
16 sort of chance to be heard specifically on the matter,
17 especially where if the California Supreme Court has ruled
18 that it is a matter of law instead of a matter of fact, that
19 makes sense because it's a statute, it would be weird to let
20 a jury do it, but I haven't really seen any law on that. You
21 know, if there is some jury instruction in CACI saying this
22 is how the jury is supposed to do it, I'm going to feel
23 foolish granting you summary judgment.

24 So that is my response to what would otherwise be
25 the strong argument that you are making.

MR. KUNIN: And just as to that, the parties did brief which of the measures do apply. Obviously, we argued that the first measure of value at the time of the taking applies, they came back and said we think the alternate applies, and then we cited the law that showed that the cases they cited actually support our position because of the manifest unjust nature. Again, we are not the ones who committed the error. We are not the ones accused of the wrongdoing. We are the ones who brought it to their favor.

So we did brief that. We certainly wouldn't be opposed to a summary judgment ruling, a partial, as you called it, that says this is the measure of the damage, and then I'm sure that we could work out what is that number after that.

But unless you have any further questions from me, like I said, I had a nice outline, but I think your order otherwise addressed everything succinctly.

THE COURT: Okay. Thank you.

What does the plaintiff have to say?

MR. LEIDER: Good morning, Your Honor.

I want to clarify something that, at least in the tentative and from what Mr. Kunin has said so far, doesn't seem particularly clear. The primary relief my client seeks is not compensatory damages. What my client seeks is the return of 200 Bitcoin. That is restitution. Unjust

1 enrichment, the remedy is restitution.

2 If a converter of property still possesses the
3 property, they return the property, not its equivalent value
4 in dollars. In this case, the evidence is clear the auditor
5 came to their client in February of 2017 and said, "You have
6 200 Bitcoin too many. Why?" Their controller went and said,
7 "Where did we get these 200 Bitcoin? We don't know where we
8 got them." And she figured out they got them from my client.

9 When they brought that error to our attention, and
10 we concede it was our error, it's irrelevant for purposes of
11 a conversion action, we said, "Give us back our 200 Bitcoin."
12 And they refused.

13 Why did they refuse? Because the value of Bitcoin
14 had gone up. And since that time, the value of Bitcoin has
15 gone up that much more. There is clear California case law,
16 I will cite it to the Court if it wishes, that says holding
17 onto the property after a proper demand has been made when
18 you have a rightful -- you have a right to possession of the
19 property, is itself conversion. That continues to this day.
20 They still have the 200 Bitcoin. We are not asking for the
21 value of 200 Bitcoin, we are asking for 200 Bitcoin.

22 THE COURT: Just one thing, let me ask you, or the
23 defendant, as well, just so when I write my final order,
24 however way it goes, what is the convention here in regard to
25 Bitcoin? Is it Bitcoins with a plural, or Bitcoin that you

1 have 200, but it's still Bitcoin without the S, or what is
2 just the general convention among people who are using the
3 currency?

4 MR. LEIDER: It's a good question. I had the same
5 question when I started speaking to my client about the case.
6 You see it both ways. People refer to Bitcoin generically as
7 Bitcoin, and then when it's plural, you have 500 Bitcoin.
8 Some people say 500 Bitcoins, some people say 500 Bitcoins.
9 I use the plural with the S just to be clear that we are
10 talking about a plural.

11 THE COURT: All right. Anything else, and then I'll
12 give Bitpay a chance to briefly be heard, so the record here
13 is clear. Anything else besides the point that you are
14 making that you deserve to get the thing back, and not the
15 value of the thing?

16 MR. LEIDER: Yeah. The second point I would like to
17 make, I think it's also an important one, you mentioned the
18 footnote, they offered us some money based on a transaction
19 they think possibly might have been the one where they sold,
20 quote, our Bitcoin.

21 But let's step back for a moment. Bitcoin is a
22 cryptocurrency. It's like an electronic dollar and it
23 fluctuates in value. This is not something that, "Oh, I sold
24 your Bitcoin, I don't have it anymore." They have plenty of
25 Bitcoin. In fact, they have conceded in discovery they have

1 way more than 200 Bitcoin that they can return to us.

2 So if somebody bought a conversion claim, they said,
3 "I gave you \$200 too much in an exchange," and they kept the
4 money and they said, "Well, you know what? I sold it for 500
5 drachma back to, you know, two years ago," and in between the
6 drachma went and ascended way into the ceiling. You wouldn't
7 say, "Oh, well, you don't get the value of all those
8 drachma." You would say, "Give him back his \$200."

9 That is exactly what we want here. We want our 200
10 Bitcoin. It's currency. It's just like dollars. It can be
11 exchanged. It's used as a medium of exchange, just like
12 dollars. There is no reason why they should be giving us
13 dollars, like drachma, instead of just what we gave them in
14 the first instance.

15 THE COURT: All right. And what is the response of
16 Bitpay?

17 MR. KUNIN: Your Honor, a few things.

18 First, I've heard this argument about, "All we
19 really want is just our 200 Bitcoin back." And going way
20 back in time, I've said, "Can you show me case law that
21 stands for that proposition?" And I still haven't seen it,
22 even on the opposition for summary judgment.

23 First of all, it is not true that there was a
24 finding by Bitpay when they did an internal review that they
25 had 200 extra Bitcoin. That was a ledger entry, worth

1 approximately \$57,000. And what they had was a \$57,000 out
2 of balance because of that particular credit that day.

3 Their own CEO, Akbar Thobhani, even admitted in his
4 declaration, "We have no way of knowing that Bitpay sold 200
5 Bitcoin and how much Bitpay made." So there is no evidence
6 that we actually have their Bitcoin. They are just saying,
7 "Oh, they have Bitcoin."

8 What if Bitcoin went down? I don't think we would
9 be here because they are begging to give us back money,
10 number one. And what if Bitpay had taken the Bitcoin and
11 traded it and then bought IBM shares? What would they then
12 say, "Well, now we want the IBM shares back," even though the
13 conduct is exactly the same.

14 The reality is what Your Honor's already put in the
15 tentative is the standard. There is no evidence whatsoever
16 that this particular Bitcoin somehow became in the possession
17 of my client. They just got a ledger entry. That is all
18 they got. And it was a ledger entry worth 57,000. And there
19 is a reason element one of the statute is the value at the
20 time.

21 This is not like a house, which is one of the cases
22 that they cited, where somebody had a house, and then knowing
23 that somebody else actually had the rights to the house, they
24 intentionally sold it to a third-party and made a profit, and
25 there was a question of could they be forced to return the

house since they sold the house. They've got to give the profit on that number. That is not this scenario. There is no evidence whatsoever that any Bitcoin is traceable back to this particular transaction.

And the thing that is really, and we put this in our papers, it was not mentioned in the tentative, but the ruling they are seeking stands for the proposition that an entity like Ox Labs, Bank of America, Schwab, Merrill Lynch, you name it, that they can make an error and turn the investment risk on the customer, which would just open up an incredible can of worms, not to mention deter people like my client, Bitpay, that found it and opened up and said, "This is what we found on self disclosure." There is just no evidence whatsoever that we are holding this Bitcoin in a bank.

And that is in our declarations, too, unchallenged. We are not a bank that sits and stores them. It's an ongoing trade and sell, trade and sell, and there is no way to show anything that we are still the beneficiary of this Bitcoin. It's just not in the record.

Thank you, Your Honor.

THE COURT: Thank you, counsel. It's obviously an interesting issue. The matter is taken under submission.

***** ***** *****

1 I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-titled matter.
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8 Amy C. Diaz, RPR, CRR

April 17, 2020

9 S/ Amy Diaz

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